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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,

Petitioner,

vs.

SANDRA WETZEL, and MARI ROSS, on Behalf of Themselves and All Others Similarly Situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should certiorari be granted to review a finding that a contributory disability insurance program to which insurance company employees must subscribe as a condition of employment violates Title VII of the Civil Rights Act of 1964 where (1) the program provides benefits for all disabilities to which male employees may be subjected and no benefits for pregnancy-related disabilities; (2) the employer elected to offer no evidence of the reasons for its enactment of the program or of any potential adverse effects which including such benefits might have on the program or on the operation of its business; and (3) all of the employer's other pregnancy-related employment practices have been held to be violative of Title VII?

COUNTERSTATEMENT OF THE CASE

Petitioner, a national insurance underwriting company, provides a contributory disability insurance program to which its employees must subscribe as a condition of employment. Of all medically verifiable disabilities, other than those resulting from acts of war, intentionally self-inflicted injuries or accidents arising out of employment (for which workmen's compensation benefits would accrue), only pregnancy-related disabilities are excluded from coverage. The plan has always been contributory, and the employee's mandatory contribution has ranged from approximately one-third to fully one-half of the cost of coverage.

The disability insurance plan is not the only source of Petitioner's disparate treatment of female employees.[1] Petitioner's employment practices relating to pregnancy have varied somewhat since the effective date of Title VII, but have never complied with the law. Until March, 1967, pregnant employees were not permitted to work beyond the sixth month of pregnancy under any circumstances. Instead, they were discharged. In March, 1967, Petitioner modified its policy slightly so that pregnant employees were fired after the eighth, rather than the sixth, month of pregnancy. Automatic termination continued until September, 1970, when Petitioner began to impose unpaid leaves of absence as an alternative to mandatory discharge. Employees were placed on mandatory leaves of absence after the eighth month of pregnancy and had to return to work no later than

[1]The trial and appellate courts also condemned Petitioner's hiring and promotion practices. 508 F.2d 239 (3d Cir. 1975). Petitioner is seeking review of procedural aspects of that decision in a separate Petition for Writ of Certiorari at No. 74-1288. Respondents are seeking review of one aspect of that decision in a Petition for Writ of Certiorari at No. 74-1319. A separate claim of discrimination in compensation was tried and is pending before the trial court.

six months from commencement of the leave or three months from the date of delivery, whichever came first. The policy was modified in November, 1971, to enable an employee to work for as long as her physician verifies her ability to continue. The mandatory return dates, which were applied uniformly without regard to any disabling complications which may result from pregnancy or childbirth, remained in force. These discharge, leave and return date practices applied to no other disabilities.

After pursuing their administrative remedies, Respondents, two of Petitioner's female employees, commenced this Title VII class action. Their complaint challenged, *inter alia*, the practices outlined above. Following comprehensive discovery, Respondents moved for summary judgment on the issue of liability. Petitioner elected not to offer evidence of the reasons for its practices or of any financial or business consequences which might result from abandoning those practices. The trial court declared the pregnancy-related policies violative of Title VII. Although no relief, in the form of an injunction or otherwise, was granted, the trial court directed the entry of final judgment on the pregnancy-related claims pursuant to F.R.C.P. 54(b). Petitioner appealed with respect to those aspects of the pregnancy-related issues dealing with its insurance program and its policy of discharging disabled female employees who do not return to work from maternity leaves of absence by a date certain without regard to medical disabilities. The Court of Appeals for the Third Circuit affirmed. The Petitioner has abandoned its argument concerning its mandatory return date policy for disabled pregnant employees and has petitioned this Court to review only those aspects of the decision dealing with the exclusion of benefits for pregnancy-related disabilities from its otherwise all-inclusive program. Although only one practice has been offered for review by this Court, Respondents have

summarized their employer's other pregnancy-related employment practices and the rulings of the trial and appellate courts with respect to those practices because acceptance of Petitioner's argument automatically will validate those practices as well. Petitioner has contended that no disparate treatment of pregnant employees is proscribed by Title VII. If such is the case, the employer will be free not only to deny benefits for pregnancy-related disabilities, but also to reinstate its policy of firing pregnant employees without regard to the ability to work or to their records as stellar, loyal employees.

It is important to define precisely what Respondents do and do not claim. Contrary to the suggestions contained in the Petition and the *amicus* briefs, Respondents do not contend that Title VII requires all employers to provide income protection plans or disability benefits for normal pregnancy leaves or for all pregnancy-related disabilities. They do contend that in the absence of a legally valid justification for exclusion, an employer who has a disability program which provides insurance coverage and paid leaves of absence for every disability with which a male may be afflicted is precluded by Title VII from excluding only pregnancy-related disabilities and absences from that program. This case is limited also to a context in which the employer offered no justification for any of its practices and in which all of those practices were condemned by the trial and appellate courts. The belated and unrelated factual arguments now raised by Petitioner and its companion *amici* have nothing to do with this case.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS OR WITH ANY APPLICABLE DECISION OF THIS COURT.

Notwithstanding the efforts to suggest the existence of a conflict between the Court of Appeals' decision and the decisions of other District or Circuit Courts or of this Court, no conflict exists. There is virtual unanimity among the courts which have considered the present issue. In *Holthaus v. Compton & Sons, Inc.*, ___ F.2d ___, 9 EPD ¶ 10,068 (8th Cir. 1975), the Court of Appeals for the Eighth Circuit specifically relied upon the Court of Appeals' reasoning in this case and rejected Petitioner's position. Similarly, in *Communications Workers v. AT&T Co.*, ___ F.2d ___, 10 FEP Cases 435 (2d Cir. 1975), the Court of Appeals, citing *Wetzel* and other Title VII decisions, held that allegations of disparate treatment between pregnancy-related and other disabilities in a private employment context are sufficient to state a claim on which Title VII relief can be granted. Even before the decisions in *Holthaus*, *Communications Workers* and this case, the Court of Appeals for the Sixth Circuit affirmed the conclusion that disparate treatment of sick leave for absences due to pregnancy is violative of Title VII. *Farkas v. South Western City School District*, 506 F.2d 1400 (6th Cir. 1974), *affirming* ___ F. Supp. ___, 8 FEP Cases 288 (S.D. Ohio 1974).

Petitioner's reliance upon *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975), to create the illusion of a conflict is misplaced. That case, which involved a grooming code that imposed different maximum hair lengths for males and females, actually supports Respondents' position. Judge Simpson, admittedly in *dictum*, concluded that employers cannot have one policy for

men and another for women if the distinction is based on some fundamental right. Consistent with the opinions of this Court, he included within those fundamental rights "the right to have children or to marry." 507 F.2d 1084, 1091. This *dictum* in *Willingham* is consistent with the Fifth Circuit's earlier reasoning in *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973), *reh. denied*, 410 U.S. 959 (1973), and *Newmon v. Delta Air Lines, Inc.*, 475 F.2d 768 (5th Cir. 1973).

Reliance upon *Sale v. Waverly-Shell Rock Board of Education*, ___ F. Supp. ___, 9 FEP Cases 138 (N.D. Iowa 1975), to suggest the possibility of conflicting decisions is even more inappropriate. Petitioner concedes that *Sale* is consistent with *Wetzel*, but asserts the certification of the case for an immediate appeal pursuant to 28 U.S.C. §1292(b) in support of the existence of a conflict. Leave to appeal was denied more than two months before this Petition was filed. ___ F.2d ___ (8th Cir., January 31, 1975, Misc. No. 75-8088).[2]

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[2]Other District Courts have reached the conclusion urged by Respondents. *Dessenberg v. American Metal Forming Co.*, ___F. Supp. ___, No. C 72-48 T, (N.D. Ohio, E.D. 1973); *Singer v. Mahoning County Board of Mental Retardation*, 379 F. Supp. 986 (N.D. Ohio 1974); *Scott v. Opelika City Schools*, 63 F.R.D. 144 (M.D. Ala. 1974); *Lillo v. Plymouth Local Board of Education*, ___F. Supp. ___, 8 EPD ¶9510 (N.D. Ohio 1973); *Vineyard v. Hollister Elementary School District*, 64 F.R.D. 580 (N.D. Cal. 1974); *Gilbert v. General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974) (Argued and pending before the United States Court of Appeals for the Fourth Circuit at No. 74-1557).

Even *Newmon v. Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973), relied upon by Petitioner, is consistent with the instant decision. The Court held that arbitrarily fixing a time when a pregnant woman must terminate her employment constitutes proscribed sex discrimination under Title VII. A contrary result was reached with respect to sick benefits because of the court's conclusion concerning the definition of the word *sick* within the meaning of the particular employer's benefit plan.

There is no conflict between the holding in this case and any applicable decision of this Court. Notwithstanding Petitioner's and *amici's* repeated references to footnote 20 to Mr. Justice Stewart's opinion in *Geduldig v. Aiello*, 417 U.S. 484 (1974), that decision is neither factually nor legally applicable. The Third Circuit's view of the Title VII/14th Amendment dichotomy is buttressed by the comprehensive and cogent analysis in *Communications Workers v. AT&T Co., supra*, where the Petitioner's argument was confronted and rejected squarely. The court reasoned as follows:

> Footnote 20 of the majority opinion, on which the district court below principally relied in holding that *Aiello* required dismissal of the complaint in the case at bar is in essence a refutation of the dissenting view as to the Equal Protection standards of judicial scrutiny applicable to the California legislative classification before the Court. It rejects the dissenting view that the California classification should be treated like the legislative classifications in *Reed, supra*, and *Frontiero, supra*. Stating that not "every legislative classification concerning pregnancy is a sex-based classification . . .", it goes on to say that "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, *lawmakers are constitutionally free* to include or exclude pregnancy *from the coverage of legislation such as this* on any reasonable basis . . . ." . . . Thus, footnote 20 deals with the constitutional validity of legislative classifications under the Equal Protection Clause, the standards of judicial scrutiny to be applied in making such a determination, and nothing more. Moreover, it does so in the context of the extensive record before the Court as to the operation and effects of the particular statutory insurance program it was considering and the considerations which led the California legislature to adopt it.

> Nowhere, either in the body of the majority opinion in *Aiello* or in the footnote, is there any reference to the provisions of Title VII or the EEOC guidelines designed to prohibit the disparate treatment of pregnancy disabilities in the employment context. ___ F.2d ___, ___, 10 FEP Cases 435, 439-40. (Footnotes omitted).

The court also pointed out Mr. Justice Stewart's note in the majority opinion in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), where he recognized that Title VII was inapplicable to the Fourteenth Amendment cases then before the court. Mr. Justice Stewart observed:

> Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women *presumptively* violates Title VII, 29 C.F.R. §1604.10, 37 Fed. Reg. 6837. While the Statutory Amendments and the Administrative Regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future. 414 U.S. 632, 639, n.8. (Emphasis added).

As the court aptly concluded in *Communications Workers*, "It can scarcely be thought that Justice Stewart in *Aiello sub silentio* invalidated the guidelines which he had said only five months before in *LaFleur* would, in the future, affect suits involving pregnancy-related employment practices." ___ F.2d ___, ___, n. 11, 10 FEP Cases 435, 440, n. 11.

Petitioner contends that the equal protection issue in *Geduldig* posed a two step analytical framework which first required a determination of whether there was discrimination on the basis of sex, and, then, if so, whether the discrimination was supported by rational reasons. Petitioner admits that the second step of that analysis can yield different results under Title VII than under the Equal Protection Clause, but suggests that all of the analysis which

precedes *Geduldig's* footnote 20 is *dictum*, and that footnote 20 was dispositive not only of the issues in *Geduldig*, but also of the issues in this case. Even footnote 20, which Respondents respectfully submit does not represent the Court's holding, does not purport to validate every insurance program which excludes pregnancy as a compensable disability. In fact, the footnote states to the contrary. It suggests, if indeed it does not mandate in a Fourteenth Amendment context, an inquiry into the background, purposes and funding of such programs to ascertain the reasons for distinctions involving pregnancy. Even if a similar inquiry were relevant in a Title VII case, Petitioner simply asserted its freedom to treat pregnant employees as it deemed fit without regard to costs, motive, business necessity or consequences. Presumably, if valid reasons existed for its position, Petitioner, who is engaged in the business of evaluating and underwriting insurance risks, would have stated those reasons. Petitioner is not free now to dredge up and rely upon the belated factual assertions made by its supporting *amici* in their briefs and their own litigation.

Title VII assures equality of employment *opportunities* by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Petitioner's pregnancy-related practices deprive only women of employment opportunities. Only women cannot resume full time employment with no loss of status following a long term disability without regard to the cause of the disability. Only disabled women must return to work or be discharged by a date certain. By providing income protection benefits to all disabled male employees until age 65, Petitioner provides the opportunity to be free from the financial ruin which

often accompanies long term disability. It is no answer to assert that the practices have adverse consequences upon and constitute disparate treatment of only a subgroup of one sex. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). Every female employee, whether or not she becomes pregnant, is subject to the potentially disastrous economic impact of Petitioner's practices.

Respondents respectfully submit that the decision of the Court of Appeals in this Title VII action does not conflict with the Fourteenth Amendment holding in *Geduldig*, and that it is in harmony with those decisions of this Court which recognize that Title VII was intended to protect and promote employment opportunities.

II. THE COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Petitioner argues that this case involves an important question of federal law which has not been, but should be, settled by this Court. Admittedly, whether disparate treatment of pregnant employees can ever be violative of Title VII is an important question of federal law.[3] In light of the virtual unanimity among the decisions of District and Circuit Courts, the absence of a conflict with any applicable decision of this Court, Petitioner's refusal to justify its practices on a cost, policy, purpose or business necessity basis, and the now uncontested unlawfulness of all of Petitioner's other pregnancy-related employment practices, Respondents submit that this case does not present an appropriate vehicle for this Court to settle any questions

[3]Even under Petitioner's broad interpretation of *Geduldig v. Aiello*, *supra*, there are circumstances under which such treatment can violate Title VII. It would be inappropriate on this record to speculate about all of those circumstances.

which go beyond the narrow facts of this controversy. Assuming, *arguendo*, that matters such as cost, business necessity or intent may be defenses in certain cases, no proper procedure exists for resolving in this litigation the factual arguments now raised by Petitioner and its supporting *amici* concerning the purposes and objectives of employee disability and leave plans, the cost of providing coverage for pregnancy-related disabilities under such plans, the nature of the risks involved, allegedly reasonable bases for excluding certain coverages and the effect on the plans of including those coverages. A full record of the type which was extant in *Geduldig*, and to which the court referred in *Communications Workers*, would be required.

III. THE PETITION SHOULD NOT BE GRANTED TO REVIEW THE EEOC'S INTERPRETATIVE GUIDELINES.

In adopting a shotgun approach intended to undermine the Commission's guidelines with which their practices conflict, Petitioner and the *amici* misinterpret the decisions which deal with the guidelines and, consequently, fail to recognize the very narrow range within which such interpretations will not be afforded deference. This Court first put its imprimatur of deference upon the Commission's interpretative rules in *Griggs v. Duke Power Co.*, *supra*. Thereafter, in *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973), it reaffirmed the principle that the guidelines are entitled to great deference except in those unusual circumstances where "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question" or "where there are 'compelling indications that it is wrong.' " 414 U.S. 86, 94-95. Those unusual circumstances are absent here. As the Commission pointed out in its *amicus curiae* brief before the Court of Appeals, the guidelines evolved as perceptions—by the Commission and others—of what con-

stitutes employment discrimination. The Commission's failure to issue its guidelines immediately cannot abrogate rights already in force under Title VII. *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971), *cert. denied sub nom. Drewrys Limited U.S.A., Inc. v. Bartmess*, 404 U.S. 939 (1971); *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90 (3d Cir. 1973).

In addition, as recognized in *LaFleur*, the guidelines provide only one method of establishing a *prima facie* or presumptive showing of discrimination. Section 1604.10(a) provides that an employment policy or practice which excludes employees or applicants from employment because of pregnancy is in *prima facie* violation of Title VII. Contrary to Petitioner's contention, the Court of Appeals did not hold and Respondents do not suggest that the guidelines somehow have the force of law. On the state of this record, however, consistent with *Geduldig's* statement concerning pretexts, the guidelines at least shifted to Respondent the burden of coming forward with some evidence to show the absence of a pretext. Notwithstanding the trial court's requests, Petitioner presented no evidence. The suggestion now that the Commission is obligated to justify the evolution of an interpretation which has received judicial approval and to demonstrate its consistency with the intention of Congress is tantamount to placing the Commission on trial. Acceptance of this position will hinder rather than facilitate the litigation of legitimate Title VII grievances.[4]

[4]The principal remaining argument relied upon in support of the Petition is found in Westinghouse Electric Corporation's comprehensive treatment of the legislative history of the proposed Equal Rights Amendment to the United States Constitution. The legislative history of another provision which may or may not become law cannot be relied upon to interpret an extant, different statute. *United States v. Lincoln Rochester Trust Co.*, 297 F.2d 891 (2d Cir. 1962), *cert. denied*, 369 U.S. 887 (1962); *Interstate Natural Gas Co. v. Federal Power Commission*, 156 F.2d 949 (5th Cir. 1946), *affirmed*, 331 U.S. 682 (1947), *reh. denied*, 332 U.S. 785 (1947).

CONCLUSION

For all of the reasons stated above, Respondents respectfully submit that within the narrow factual and legal confines of this case no issue is presented which is worthy of the grant of certiorari by this Court. Thus, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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